

AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT
Application 10/666,227
Attorney Docket 2002P15657US01 (1009-040)

REMARKS

Applicant respectfully thanks the Examiner for the consideration provided to this application, and respectfully requests reconsideration of this application.

Claim 41 has been added.

Claims 1-41 are now pending in this application. Each of claims 1, 33, 34, and 40 is in independent form.

I. The "Response to Arguments"

The Office Action mailed on 10 July 2008 (the "present Office Action") includes a section titled "Response to Arguments". To the extent that the "Response to Amendment" section attempts to characterize or mischaracterize any portion of Applicant's Reply to the Office Action dated 31 October 2007, such as via the numerous inaccuracies presented under the allegation of what "[t]he evidence of the Affidavit consists substantially of" (referencing an affidavit submitted under 37 CFR 1.132 and filed 10/31/2007), Applicant respectfully traverses, and instead respectfully requests a response to the specific evidence of the Affidavit and arguments presented by Applicant.

II. The Obviousness Rejections

Each of claims 1 - 40 was rejected under 35 U.S.C. 103(a) as being obvious, and thus unpatentable, over various combinations of U.S. Patent Application Publication 2003/0184580 ("Kodosky"), and/or U.S. Patent 5,870,559 ("Leshem"). Each of these rejections is respectfully traversed.

A. Legal Standards

1. Overview of *Prima Facie* Criteria for an Obviousness Rejection

The Patent Act, namely, 35 U.S.C. 103, forbids issuance of a patent when "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a

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person having ordinary skill in the art.”

Relatively recently, in *KSR International Co. v. Teleflex, Inc.*, 550 U.S. ___, 127 S. Ct. 1727, 2007 U.S. LEXIS 4745 (2007), the Supreme Court interpreted this law while highlighting the typical invention process. “**Inventions usually rely upon building blocks long since uncovered, and claimed discoveries almost necessarily will be combinations of what, in some sense, is already known**” (emphasis added). Yet, to properly apply §103, the Court recognized the need to filter, via obviousness analyses, true inventions from mere ordinary technological advances. “**Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility**” (emphasis added).

In *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), the Supreme Court established factors regarding the factual inquiry required to establish obviousness. The factors include:

1. determining the scope and contents of the prior art;
2. ascertaining differences between the prior art and the claims at issue;
3. resolving the level of ordinary skill in the pertinent art; and
4. considering objective evidence indicating obviousness or nonobviousness.

Regarding proposed combinations of prior art, *KSR* clarified that the “[t]he question is not whether the combination was obvious to the patentee but whether the combination was obvious to a person with ordinary skill in the art”. Thus, in determining obviousness, both *KSR* and *Graham* warned against a “temptation to read into the prior art the teachings of the invention in issue” and instruct to “guard against slipping into the use of hindsight”.

KSR further warned, “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art”. The Federal Circuit has held that “[w]hen there is a design need or market pressure to solve a problem”, obviousness is not supported unless “a finite, and in the context of the art, small or easily traversed, number of options” “would convince an ordinarily skilled artisan of obviousness”. *Ortho-McNeil Pharmaceutical Inc. v. Mylan Laboratories Inc.*, 520 F.3d 1358

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(Fed. Cir. 2008).

To guard against hindsight, *KSR* explained the “import[ance]” of “identify[ing] **a reason that would have prompted** a person of ordinary skill in the relevant field to combine the elements **in the way the claimed new invention does**” (emphasis added). That is, “rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some **articulated reasoning** with some rational underpinning to support the legal conclusion of obviousness” (quoting *In re Kahn*, 441 F. 3d 977, 988 (Fed. Cir. 2006) (emphasis added)). Thus, “[t]o facilitate review, this analysis should be made explicit”.

Explaining the need for “**a reason that would have prompted** a person of ordinary skill”, *KSR* further taught that “if a **technique** has been used **to improve** one device, and a person of ordinary skill in the art **would recognize** that it would improve similar devices in the same **way**, using the technique is obvious unless its actual application is beyond his or her skill” (emphasis added). Further exploring this mandate, the Federal Circuit has recently recognized that “knowledge of a problem and motivation to solve it are entirely different from motivation to combine particular references”. *Innogenetics v. Abbott Laboratories* (Fed. Cir. 2007-1145) (8 January 2008).

Thus, according to the Supreme Court, a proper obviousness rejection must “identify **a reason that would have prompted** a person of ordinary skill in the relevant field to combine the elements **in the way the claimed new invention does**” and must present substantial evidence that one of ordinary skill **WOULD** recognize that alleged reason for making the particular claimed combination. It follows that if the alleged reason for making the particular combination of features is not evidenced to be art-recognized, then that reason **MUST BE** based on hindsight.

In addition to establishing a proper reason to combine, a proper obviousness rejection must clearly identify proposed reference(s) that:

1. are pertinent;
2. provide a reasonable expectation of success; and
3. teach... all the claim limitations

See MPEP 2143; MPEP 2143.03, *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir.

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1991); and additional citations *infra*.

Consistent with other patentability rejections, to establish a *prima facie* case of obviousness, substantial evidence must be provided that fulfills the mandates of the applicable law. The "Patent Office has the initial duty of supplying the factual basis for its rejection." *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967), *cert. denied*, 389 U.S. 1057, *reh'g denied*, 390 U.S. 1000 (1968). "It may not... resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in its factual basis". *Id.*

It is legal error to "substitute[] supposed *per se* rules for the particularized inquiry required by section 103. It necessarily produces erroneous results." *See, In re Ochiai*, 71 F.3d 1565, 1571, 37 USPQ2d 1127, 1132-33 (Fed. Cir. 1998); *In re Wright*, 343 F.2d 761, 769-770, 145 USPQ 182, 190 (CCPA 1965).

"Once the examiner... carries the burden of making out a *prima facie* case of unpatentability, 'the burden of coming forward with evidence or argument shifts to the applicant.'" *In re Alton*, 76 F.3d 1168, 37 USPQ2d 1578 (Fed. Cir. 1996) (*quoting In re Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444).

2. Claim Construction

Before the *prima facie* obviousness criteria can be applied, the words of each claim must be interpreted. The Federal Circuit, in *Phillips v. AWH Corp.*, 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005) (*en banc*), *cert. denied*, 546 U.S. 1170, 126 S.Ct. 1332, 164 L.Ed.2d 49 (2006) clarified that:

1. "[t]he Patent and Trademark Office ('PTO') determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction 'in light of the specification as it would be interpreted by one of ordinary skill in the art'" (*Id.* at 1316);
2. the words of a claim "are generally given their ordinary and customary meaning" (*Id.* at 1312);
3. the ordinary and customary meaning of a claim term is "the meaning that the term

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- would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application” (*Id.* at 1313);
4. “the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but **in the context of the entire patent**, including the specification” (*Id.*);
 5. even “the context in which a term is used in the asserted claim can be highly instructive” (*Id.* at 1314);
 6. “the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, **the inventor’s lexicography governs**” (*Id.* at 1316);
 7. even “when guidance is not provided in explicit definitional format, **the specification may define claim terms by implication** such that the meaning may be found in or ascertained by a reading of the patent documents” (*Id.* at 1321);
 8. an “invention is construed not only in the light of the claims, but also with reference to the file wrapper or prosecution history in the Patent Office” (*Id.* at 1317 (*citing Graham v. John Deere Co.*, 383 U.S. 1, 33 (1966))); and
 9. the “prosecution history... consists of the complete record of the proceedings before the PTO and **includes the prior art cited during the examination of the patent**” (*Id.* at 1317).

The rules established in *Phillips* apply to *ex parte* examination in the USPTO. *See, In re Kumar*, 418 F.2d 1361 (Fed. Cir. 2005).

3. All Words in a Claim Must Be Considered

“To establish *prima facie* obviousness..., ‘[a]ll words in a claim must be considered’”. MPEP 2143.03, quoting *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970); *see also, In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974); *In re Wilder*, 429 F.2d 447, 166 USPQ 545, 548 (CCPA 1970); *In re Angstadt*, 537 F.2d 498, 190 USPQ 214, 217 (CCPA 1976); *In re Geerdes*, 491 F.2d 1260, 180 USPQ 789, 791 (CCPA 1974).

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4. Unfounded Assertions of Knowledge

Deficiencies of the cited references can not be remedied by general conclusions about what is basic knowledge or common sense to one of ordinary skill in the art. *In re Zurko*, 258 F.3d 1379, 1385-86 (Fed. Cir. 2001). An assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support. *Id.* That is, such unfounded assertions are not permissible substitutes for evidence. *See, In re Lee*, 277 F.3d 1338, 1435, 61 USPQ2d 1430, 1435 (Fed. Cir. 2002).

5. Determination of the Level of Skill

Under *Graham*, the required "factual determinations underpinning the legal conclusion of obviousness include 1) the scope and content of the prior art, 2) the level of ordinary skill in the art, 3) the differences between the claimed invention and the prior art, and 4) evidence of secondary factors, also known as objective indicia of non-obviousness." *Eisai Co. Ltd. v. Dr. Reddy's Laboratories, Inc.*, 2008 WL 2791884 (Fed. Cir. 2008), *citing Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). "The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry." *Ryko Mfg. Co. v. Nu-Star, Inc.*, 950 F.2d 714, 718, 21 USPQ2d 1053, 1057 (Fed. Cir. 1991). Thus, the "examiner must ascertain what would have been obvious to one of ordinary skill in the art at the time the invention was made, and 'not to the inventor, a judge, a layman, those skilled in remote arts, or to geniuses in the art at hand'." MPEP 2141.03, *quoting Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 218 USPQ 865 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

6. Next Office Action

If an Office Action fails to set forth sufficient facts to provide a *prima facie* basis for the rejections, any future rejection based on the applied reference will necessarily be factually based on an entirely different portion of that reference, and thus will be legally defined as a "new grounds of rejection." Consequently, any Office Action containing such rejection can not

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properly be made final. *See, In re Wiechert*, 152 USPQ 247, 251-52 (CCPA 1967) (defining “new ground of rejection” and requiring that “when a rejection is factually based on an entirely different portion of an existing reference the appellant should be afforded an opportunity to make a showing of unobviousness vis-a-vis such portion of the reference”), and *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967) (the USPTO “has the initial duty of supplying the factual basis for its rejection”).

B. Analysis

1. *Prima Facie* Criteria

None of the applied portions of the references relied upon in the Office Action, whether considered alone or in combination, establishes a *prima facie* case of obviousness.

2. The Declaration

On 31 October 2007, a Declaration under 37 C.F.R. § 1.132 of Colleen Guy (an inventor of record of the present application and one skilled in the art of industrial computer applications engineering as of 24 March 2000, the priority date claimed by the present application) was entered into the record. The present Office Action fails to accord Ms. Guy’s Declaration (“the Declaration”) the evidentiary weight to which that Declaration is entitled. The present Office Action merely asserts, “it [the Declaration] fails to provide outweighing objective evidence.” This assertion is baseless since the present Office Action offers no evidence whatsoever regarding how one having ordinary skill in the art would interpret the claimed subject matter of each of claims 1-40 and whether one having ordinary skill in the art would find that claimed subject matter obvious in view of the applied portions of the relied upon references. No evidence whatsoever cannot outweigh the evidence of the Declaration.

The present Office Action mischaracterizes the content of Ms. Guy’s Declaration, by asserting, at Page 3:

The evidence of the Affidavit consists substantially of statements expressing that:
(1) one of ordinary skill in the art would not find the assertions of the Previous

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Office Action to be true; and (2) that on one of ordinary skill art would not understand the cited references' disclosures.

The evidence of the Affidavit as not provided any objective evidence of secondary considerations such as unexpected results, commercial success, long-felt need, failure of others, copying by others, licensing, or skepticism of experts. In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness.

Instead of this mischaracterized content, the Declaration:

- a. indicates the qualifications of Ms. Guy (see, e.g., ¶ 12-14);
- b. indicates that Ms. Guy reviewed the documents at issue regarding the present application, was familiar with the subject matter of the documents at issue regarding the present application, and knew what one of ordinary skill in the art of the present application would have known on the priority date claimed by the present application (see, e.g., ¶ 5-11);
- c. cites claim language at issue (see, e.g., ¶ 12-13 and 27-28);
- d. references statements in the prior Office Action dated 22 August 2007 ("the prior Office Action") alleging that the applied portions of the relied-upon references teach the claimed subject matter at issue (see, e.g., ¶ 14, 29, and 35);
- e. indicates that one having ordinary skill in the art would have found the referenced statements of the prior Office Action factually incorrect as of the priority date claimed by the present application (see, e.g., ¶ 15, 30, and 36);
- f. indicates, based upon cited evidence, how one having ordinary skill in the art would construe the claimed subject matter of claims 1-40 (see, e.g., ¶ 17-18);

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- g. cites evidence from the applied portions of the relied upon references (see, e.g., ¶ 19-21 and 32);
- h. provides evidence indicating why the applied portions of the relied-upon references do not teach the claimed subject matter of claims 1-40 (see, e.g., ¶ 22-24, 31, 33-34, and 37-38); and
- i. indicates, based upon the cited evidence, that the present Office Action is in error in asserting that the applied portions of the relied-upon references teach the claimed subject matter of claims 1-40 (see, e.g., ¶ 25-26 and 39-40).

Since the Declaration provides persuasive evidence that the prior Office Action does not present a *prima facie* rejection of any of claims 1-40, no requirement exists that the Declaration address secondary considerations regarding patentability of the claimed subject matter. A proper consideration of the Declaration is respectfully requested along with a resultant withdrawal of each rejection of each of claims 1-40.

3. Missing Claim Limitations

The present Office Action alleges, at Page 5, regarding a portion of this claimed subject matter prior to the present amendments, that Kodosky teaches “via the HMI screen navigation editor, enabling the user to create a collection comprising a linked hierarchically organized plurality of HMI screen nodes” at paragraphs 1 and 375.

Paragraphs 12-25 of the Declaration evidence that one having ordinary skill in the art would not have found that the applied portions of Kodosky teach, “via the HMI screen navigation editor, enabling the user to create a collection comprising a linked hierarchically organized plurality of HMI screen nodes”, as claimed by each of claims 1 and 33.

Paragraphs 13-26 of the Declaration evidence that one having ordinary skill in the art would not have found that the applied portions of Kodosky teach, “an HMI screen navigation editor operatively adapted to: enable a user to create a collection comprising a linked hierarchically organized plurality of HMI screen nodes”, as claimed by claim 34.

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Paragraph 24 of the Declaration evidence that one having ordinary skill in the art would not have found that the remaining applied portions of the relied-upon references overcome at least these deficiencies of Kodosky.

Each of independent claims 1 and 33, from one of which each of claims 2-32 and 35-39 ultimately depends, states, *inter alia*, yet no substantial evidence is presented that the applied portions of Kodosky teach, “responsive to a detected collision between a parent node of said linked hierarchically organized plurality of HMI screen nodes and a first child node of a plurality of child nodes of said parent node, automatically recursively adjusting a position of said parent node until an adjusted position of said parent node does not create, with respect to each child node of said plurality of child nodes, a determined collision with said child node, said determined collision determined based upon said adjusted position of said parent node and a calculated position of said child node”.

Independent claim 34 of the present application states, *inter alia*, yet no substantial evidence is presented that the applied portions of Kodosky teach, “an HMI screen navigation editor operatively adapted to: responsive to a detected collision between a parent node of said linked hierarchically organized plurality of HMI screen nodes and a first child node of a plurality of child nodes of said parent node, automatically recursively adjust a position of said parent node until an adjusted position of said parent node does not create, with respect to each child node of said plurality of child nodes, a determined collision with said child node, said determined collision determined based upon said adjusted position of said parent node and a calculated position of said child node”.

The Office Action asserts, at Page 5, that Kodosky at paragraph 185 teaches “responsive to a detected collision between a parent node of said linked hierarchically organized plurality of HMI screen nodes and a first child node of a plurality of child nodes of said parent node (‘...The ‘drag and drop’ method may comprise the user selecting the first program icon with a pointing device (e.g., a mouse) and dragging the first program icon on the display to be on top of or proximate to the first device icon....,’ para. [0185]) automatically adjusting a nodes position

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(‘...The connections between device icons that are automatically displayed may be displayed with an appearance indicating the type of detected connection....,’ para. [0016]).”

Paragraphs 27-39 of the Declaration evidence that one having ordinary skill in the art would not have found that the applied portions of Kodosky teach, “responsive to a detected collision between a parent node of said linked hierarchically organized plurality of HMI screen nodes and a first child node of a plurality of child nodes of said parent node, automatically recursively adjusting a position of said parent node until an adjusted position of said parent node does not create, with respect to each child node of said plurality of child nodes, a determined collision with said child node, said determined collision determined based upon said adjusted position of said parent node and a calculated position of said child node”, as claimed by each of claims 1 and 33.

Paragraphs 28-40 of the Declaration evidence that one having ordinary skill in the art would not have found that the applied portions of Kodosky teach, “an HMI screen navigation editor operatively adapted to: responsive to a detected collision between a parent node of said linked hierarchically organized plurality of HMI screen nodes and a first child node of a plurality of child nodes of said parent node, automatically recursively adjust a position of said parent node until an adjusted position of said parent node does not create, with respect to each child node of said plurality of child nodes, a determined collision with said child node, said determined collision determined based upon said adjusted position of said parent node and a calculated position of said child node”, as claimed by claim 34.

No evidence is of record that the remaining applied portions of the relied-upon references overcome at least these deficiencies of Kodosky and/or Leshem.

Thus, the present Office Action presents no substantial evidence that the applied portions of the relied-upon references teach, “responsive to a detected collision between a parent node of said linked hierarchically organized plurality of HMI screen nodes and a first child node of a plurality of child nodes of said parent node, automatically recursively adjusting a position of said parent node until an adjusted position of said parent node does not create, with respect to each child node of said plurality of child nodes, a determined collision with said child node, said

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determined collision determined based upon said adjusted position of said parent node and a calculated position of said child node” as claimed in each of claims 1 and 33.

The present Office Action presents no substantial evidence that the applied portions of the relied-upon references teach, “an HMI screen navigation editor operatively adapted to: responsive to a detected collision between a parent node of said linked hierarchically organized plurality of HMI screen nodes and a first child node of a plurality of child nodes of said parent node, automatically recursively adjust a position of said parent node until an adjusted position of said parent node does not create, with respect to each child node of said plurality of child nodes, a determined collision with said child node, said determined collision determined based upon said adjusted position of said parent node and a calculated position of said child node” as claimed in claim 34.

Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), no substantial evidence has been presented the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, expressly or inherently teach every limitation of the independent claims, and consequently the Office Action fails to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

4. Lack of Required Factual Evidence of Obviousness

Applicant respectfully notes that the present Office Action fails to evidence the scope and contents of the prior art as required under *Graham*. The present Office Action fails to even identify what “the pertinent art” is. Moreover, the present Office Action fails to evidence the level of ordinary skill in the pertinent art. Instead, the present Office Action merely lists, at Page 4, factors that may be considered in determining the level of ordinary skill in the art. Merely

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listing factors does not identify what “the pertinent art” is. Merely listing factors does not evidence the level of ordinary skill in the pertinent art.

Applicant respectfully traverses the failure of the present Office Action to comply with the requirements of *Graham* and thereby, to provide a *prima facie* rejection under 35 U.S.C. 103.

5. Conclusion

For at least these reasons, reconsideration and withdrawal of each rejection of each of claims 1, 33, and 34 is respectfully requested. Also, reconsideration and withdrawal of each rejection of each of claims 2-32 and 35-39, each ultimately depending from claim 1 is also respectfully requested.

III. New Claim 41

Claim 41 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, “automatically determining an arrangement of the collection based upon a user specified upper limit on inter-generational spacing between said parent node and said child node.” For at least these reasons, a Notice of Allowance for claim 41 is earnestly solicited.

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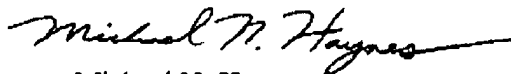
CONCLUSION

It is respectfully submitted that the application is in clear condition for allowance. Reconsideration, withdrawal of all grounds of rejection, and issuance of a Notice of Allowance are earnestly solicited.

The Office is hereby authorized to charge any additional fees or credit any overpayments under 37 C.F.R. 1.16 or 1.17 to Deposit Account 50-2504. The Examiner is invited to contact the undersigned at 434-972-9988 to discuss any matter regarding this application.

Respectfully submitted,

Michael Haynes PLC



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